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In The Supreme Court of The United States

OCTOBER TERM, 1966

D.I. OPERATING CO.,
UNITED RESORT HOTELS, INC.,
DESERT INN OPERATING COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the District Court is reported at 239 F. Supp. 78 (1965) and is reprinted in Appendix A, infra. The opinion of the Court of Appeals is reported at 362 F.2d 305 (1966) and is reprinted in Appendix C, infra.

JURISDICTION

The judgment of the Court of Appeals was entered on June 9, 1966 (Appendix D-1, D-2 and D-3, infra). A petition for rehearing en banc was denied on August 5, 1966 (Appendix E, infra). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Where 90 percent of the gross receipts of a Calcutta pool on a professional golf tournament goes to the winners and the other 10 per cent of the gross receipts goes to a recognized public charity (the Damon Runyon Memorial Fund for Cancer Research), which lent its name to the pool, is a taxpayer who conducts the pool liable for the 10 per cent wagering tax on the gross receipts of the pool on the ground that the pool was conducted for profit, even though taxpayer receives none of the gross receipts and makes no charge for conducting the pool?

The District Court answered "No."

The Court of Appeals answered "Yes."

STATUTES AND REGULATIONS INVOLVED

The statutes involved are Sections 3285, 3290, 3291, 3293, and 3294 of Chapter 27A of the Internal Revenue Code of 1939, and are set forth in Appendix F, infra, and the corresponding sections of the Internal Revenue Code of 1954, Sections 4401, 4411, 4412, 4421, 6806(c) and 7262 are set forth in Appendix G, infra.

The regulation involved is Treasury Reg. Sec. 44.4421-1(c) (4), promulgated in 1959, defining for the first time under the Internal Revenue Code of 1954 the words "conducted for profit" in Section 4421(1) (B), identical with Section 3285(b) (1) (B) in the Internal Revenue Code of 1939, which gives the definition of a wagering pool subject to the 10 per cent wagering tax as a pool "conducted for profit." There was no similar regulation under the 1939 Code. Reg. Sec. 44.4421-1(c) (4), reprinted in Appendix H, infra, provides so far as material:

> "***A wagering pool***may be conducted for profit even though a direct profit will not inure from the operation thereof. A wagering pool*** operated with the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits is conducted for profit for purposes of the wagering tax."

STATEMENT OF THE CASE

The District Court Finding VIII, reprinted in Appendix B, infra, gives the material facts, which are undisputed. The Finding was:

> "That beginning in April of 1953, and continuing to date, Desert Inn has sponsored, with the approval of the Professional Golfer's Association, an annual Tournament

of Champions in Las Vegas. Each year during the period in question, 1953-1959, on the evening immediately preceding the commencement of the golf tournament a calcutta pool was conducted by Desert Inn. The name of each participating professional golfer was offered for bid by an auctioneer to a private group of persons invited to attend a dinner and the auction at Desert Inn. Ninety per cent of all sums received from successful bidders were paid into the pool and distributed after the tournament to the winners of the pool. The remaining ten per cent was contributed by the bidders to the Damon Runyon Memorial Fund for Cancer Reserach. The Desert Inn retained no percentage of the sums received and made no charge for operating the pool. The Desert Inn had guaranteed the Runyon Cancer Fund a minimum of $35,000 annually. In each year, except 1959, ten per cent of the pool was less than $35,000 and Desert Inn in each of those years made up the difference out of pocket. In all of the years involved, both the calcutta pool and the Tournament of Champions were operated at a loss and these losses were claimed and allowed as expenses by Desert Inn on its income tax returns."

The gross receipts of the pools for the years in issue were (Appendix A, infra, pp. 22-23.)

1953	$ 93,250
1954	137,850
1955	202,500

1956	129,000
1957	265,650
1958	266,000
1959	380,000

The petitioners were assessed and paid the 10 per cent wagering tax on the gross receipts of the pool. They timely filed claims for refund, which were denied, and brought timely actions in the District Court for recovery of the taxes paid. Jurisdiction was conferred on the District Court by 28 U.S.C. Section 1346.

The District Court found for petitioners. The Court of Appeals for the Ninth Circuit reversed. A petition for rehearing was filed because of the constitutional question raised for the first time by the opinion of the Court of Appeals. The petition was denied. (Appendix E, infra.)

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S JURISDICTION.

The reversal by the Court of Appeals of the District Court cannot be justified. Its opinion is so stark a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's discretion. The Court of Appeals (1) found ambiguous the

phrase "conducted for profit" in an excise tax on wagers because of the meaning of the phrase "performance for profit" in the Copyright Act - a clear indication that it was a subjective decision that reversed the District Court; (2) the opinion interpreted subparagraph (B) of Section 3285(b) (1) (now Section 4421(1) (B)), which was in issue, by using language in the Committee Reports defining subparagraph (A) of Section 3285(b) (1) (now Section 4421(1) (A))instead of the language defining subparagraph (B), which would have shown that the petitioners were not within the sweep of said subparagraph (B), under which subsection they were taxed; and (3) the Court of Appeals found further justification by saying that the Committee Reports disclose that the excise tax statute was intended to make "commercialized gambling" help meet the need for increased revenue.

(1) The use of the language of the Copyright Act to create an ambiguity.

The District Court found the words "conducted for profit" in Section 3285(b) (1) (B) clear and unambiguous. (All statutory references will be to the sections in the 1939 Code for ease in referring to the Committee Reports, even though the opinions refer to the correlative sections in the 1954 Code.) The Court of Appeals reversed because it found the phrase ambiguous by comparing it to the phrase "performance for profit" in the Copyright Act. This is like comparing apples to elephants. For example, in Rohmer v. Commissioner, 153 F.2d 61 (C.C.A. 2, 1946) Judge Jerome Frank said, for a unanimous court, of two different sections of the same statute at p. 65:

> "***It is well to remember that the concepts employed in construing one section of a statute are not necessarily pertinent when construing another with a distinguishable background."

Yet the Court of Appeals for the Ninth Circuit construed the phrase "conducted for profit" in an excise tax statute by decisions construing the phrase "performance for profit" in the Copyright Act.

Professor deSloovère, "The Equity and Reason of a Statute," 21 Cornell Law Quarterly 591 (1936), said at p. 607, footnote 73:

> "It is a curious bit of misunderstanding of interpretation to set forth the various ways particular statutory words have been construed in the cases. Such accumulations of meanings are of no value in interpreting other statutes because contextual meanings in different statutes are never the same."

One would not - one should not - expect to find this "curious bit of misunderstanding" in an opinion of the Court of Appeals. Yet the Court of Appeals held that the phrase "conducted for profit" in the excise tax on wagers, which the District Court had found clear and unambiguous, was ambiguous because of the meaning of "performance for profit" in the Copyright Act.

The Court of Appeals said that the Government relied on cases construing 17 U.S.C. Section 1(e) (1958), to include indirect profit: in Chappell & Co. v. Middletown Farmers Market & Auction Co., 334 F.2d 303 (C.A. 3, 1964), where a shopping center piped recorded, copyrighted music through the center during shopping hours, the Third Circuit held at p. 306 that this was a "performance for profit" to the extent "that it was commercially beneficial" without regard to whether the pecuniary benefit was direct or indirect.

The Court of Appeals for the Ninth Circuit said that in the copyright cases the courts have been concerned with protecting the monopoly rights created under the

Copyright Act, a concern not present here; but that although the copyright cases were not controlling "they do suggest, contrary to the holding of the district court that the statute before us is not clear and unambiguous." (Appendix C, infra, p. 50). This statement is in conflict with the way this Court interprets statutes. Mr. Justice Frankfurter said in the Cardozo Lecture, "Some Reflections on the Reading of Statutes," 47 Colum. Law Rev., 527, 536 (1947):

> "We must, no doubt, accord the words the sense in which Congress used them. That is only another way of stating the central problem of decoding the symbols. It will help to determine for whom they were meant. Statutes are not archaeological documents to be studied in a library. They are written to guide the actions of men. As Mr. Justice Holmes remarked upon some Indian legislation, 'The word was addressed to the Indian mind,' Fleming v. McCurtain, 215 U.S. 56, 60 (1909). If a statute is written for ordinary folk, it would be arbitrary not to assume that Congress intended its words to be read with the minds of ordinary men. If they are addressed to specialists, they must be read by judges with the minds of the specialists.
>
> "And so we assume that Congress uses common words in their popular meaning, as used in the common speech of men."

In neither the common speech of men nor the cant of specialists is a taxpayer conducting a pool for profit when all the gross receipts of the pool go to the winning participants and a recognized public charity and the taxpayer pays the expenses of conducting the pool.

Although petitioners have not been subjected to what is formally a criminal penalty, the Statement of the Case shows that the 10 per cent wagering tax on the gross receipts of the pools which they were assessed, and paid, was well over $100,000, so that in substance petitioners have been subjected to an exceedingly heavy criminal penalty. U. S. v. Standard Oil Company, 384 U.S. 224 (1966), was a criminal prosecution for a violation of Section 13 of the Rivers and Harbors Act. Mr. Justice Harlan, dissenting, said at p. 236:

> "There is, however, a further reason for applying a seemingly straightforward statute in a straightforward way. In McBoyle v. United States, 283 U.S. 25, this Court held that a statute making it a federal crime to move a stolen 'motor vehicle' in interstate commerce did not apply to a stolen airplane. That too was a case in which precise clarity was not required in order to give due warning of the line between permissible and wrongful conduct, for there could not have been any question but that stealing aircraft was unlawful. Nevertheless, Mr. Justice Holmes declared that 'Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.' 283 U.S., at 27. The policy thus expressed is based primarily on a notion of fair play: in a civilized state the least that can be expected of government is that it express its rules in language all can reasonably be expected to understand. Moreover, this requirement of clear expression is essential in a practical sense to confine the discretion

> of prosecuting authorities, particularly important under a statute such as §13 which imposes criminal penalties with a minimal, if any, scienter requirement."

The Court of Appeals (Appendix C, infra, p. 50) says of the supposed ambiguity it has created:

> "In such circumstances it is well settled that treasury regulations are to be accorded great weight and not overruled unless shown to be plainly inconsistent with the statute. Koshland v. Helvering, 298 U.S. 441, 446 (1936)."

U. S. v. Calamaro, 354 U.S. 351, footnote 11, says of a Treasury Regulation on the wagering tax statute that it was issued on November 1, 1951. It was therefore contemporaneous. The Government pointed to the fact that under the Treasury Regulations the tax applied, and argued that the Treasury Regulation "constitutes an administrative interpretation to which the Court should give weight in construing the statute." Of this argument, Mr. Justice Harlan, writing for the Court, said at pp. 358-359:

> "***we cannot but regard this Treasury Regulation as no more than an attempted addition to the statute of something which is not there (Footnote omitted.) As such the regulation can furnish no sustenance to the statute. Koshland v. Helvering, 298 U.S. 441, 446-447."

This Court in Calamaro found that even a contemporaneous Regulation was an attempt to add something to the wagering tax statute which is not there.

The Regulation legitimized by the Court of Appeals

makes unclear and ambiguous statutory language otherwise patently clear and unambiguous. And the Regulation does not even have contemporaneity to support it. In White v. Winchester Country Club, 315 U.S. 32 (1942), this Court said at p. 41 of the Treasury Regulations there involved:

> "substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute."

The years in issue are 1953-1959, and the Regulation in issue was promulgated and adopted in 1959. The Court of Appeals said (Appendix C, infra), note 2, that the years 1953 and 1954 in this case are governed by the Internal Revenue Code of 1939, and that no Treasury Regulation corresponding to Sec. 44.4421-1(c) (4) was promulgated under the 1939 Code, but if that regulation correctly construes the term "conducted for profit" in Section 4421(1) (B) of the 1954 Code, it would also be a proper construction of the identical language in the 1939 Code. The "substantially contemporaneous expression of opinion" and "material evidence of the probable general understanding of the times" are best found in the Treasury Regulations under the 1939 Code, where there was no attempt to define the words "conducted for profit," which means that the Treasury, like the petitioners, believed that a wagering tax on a pool conducted for profit meant what it said.

The Treasury Regulation adopted in 1959, which the Court of Appeals holds was "properly applied in this case," as far back as 1953, like the contemporaneous Treasury Regulation rejected by this Court in Calamaro, is "no more than an attempted addition to the statute of something which is not there."

(2) The Ninth Circuit relied on language in the Committee Reports regarding subparagraph (A) of Section 3285(b)(1), which does not apply to petitioners, who were taxed under subparagraph (B).

The Court of Appeals said (Appendix C, infra, p. 51) that the Committee Reports accompanying the statute "state that the tax was not meant to apply to the purely 'social' or 'friendly' type of betting pool sometimes organized among friends or other associates," citing the House Report (1951-2 Cum. Bull. 357 at 397-8) and the identical language in the Senate Report (458 at 540), that while the pool was an invitation-only affair it was hardly the kind of "social" or "friendly" pool whose exclusion from the tax was contemplated by Congress.

The Committee Reports contradict the opinion. Thus, the last paragraph to begin on p. 397 and the first paragraph to begin on page 540 of 1951-2 Cum. Bull. show that the language quoted by the Court of Appeals is limited to Section 3285(b)(1)(A) (now Section 4421(1)(A)), which taxes a person in the business of accepting wagers on sports events or contests. The Committee Reports state (Appendix I, infra):

> "Wagers on sports events or contests, to be taxable, must be placed with a person engaged in the business of accepting such wagers. The purpose of this requirement is to exclude from tax the purely 'social' or 'friendly' type of bet. A person is considered to be in the business of accepting wagers if he is engaged as a principal who, in accepting wagers, does so on his own account."

But petitioners are not in that business, nor does the

Government contend that they are.

Instead the Government is seeking to tax petitioners under Section 3285(b) (1) (B) (now Section 4421(1) (B)). Of this section the Committee Reports say at pages 398 and 540 (Appendix I, infra):

> "[W]agers placed in a wagering pool with respect to a sports event or a contest are taxable if the pool is conducted for profit. The requirement that the pool be operated for profit is designed to eliminate from the tax base those pools which are occasionally organized among friends or other associates, all of the contributions being distributed to the winner or winners. A pool would be considered as being operated for profit, if, for example, a person appropriated to himself a percentage of the amount contributed to the pool or required a fee for the privilege of contributing to the pool."

This language leaves no doubt that petitioners are without both the literal meaning of the statute and its purpose. They did not ask for, nor receive, any of the monies contributed to the pool, nor require a fee for the privilege of contributing to the pool, and they paid, without reimbursement, the expenses of operating the pool. The District Court met the issue squarely. Finding VIII states:

> "The Desert Inn retained no percentage of the sums received and made no charge for operating the pool."

(3) The argument that commercialized gambling must help meet the need for increased revenue does not apply to a sports pool not conducted for profit, nor intended to be conducted for profit.

The Court of Appeals' opinion calls the pool conducted by petitioners "commercialized gambling" even though the Government, the District Court, and the Court of Appeals itself agree that 90 per cent of the gross receipts of the pool conducted by petitioners went to the winning participants and the other 10 per cent of the gross receipts went to a recognized public charity (the Damon Runyon Memorial Fund for Cancer Research) and that petitioners made no charge for conducting the pool.

Summary of Point I

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's discretion in granting the writ.

II. THE COURT OF APPEALS HAS DECIDED THE FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Court of Appeals has also decided the Federal question in a way in conflict with applicable decisions of this Court. In Malat v. Riddell, 383 U.S. 569 (1966), this Court reversed the Court of Appeals for the Ninth Circuit because (p. 571):

> "As we have often said; 'the words of statutes--including revenue acts--should be interpreted where possible in their ordinary everyday senses.' Crane v. Commissioner, 331 U.S. 1, 6."

In the instant case the Court of Appeals offended this rule more egregiously than they did in Malat. In Malat

there was profit, and the question was the rate of tax. In the instant case there was no profit, or attempt at profit, and the Court of Appeals has taxed petitioners on 10 per cent of the gross receipts paid into the pool.

Mr. Justice Cardozo (then Chief Judge Cardozo) said, "The output of a multitude of minds must be expected to contain its proportion of vagaries." (Cardozo, The Growth of the Law 5 (1924).) But there is a boundary even to vagaries, and the Court of Appeals has gone beyond that boundary in deciding contrary to the language of the statute, its purpose, and the Committee Reports that the petitioners were conducting a pool for profit.

The decision of the Court of Appeals is undeniably in conflict with applicable decisions of this Court.

III. THE COURT OF APPEALS' INTERPRETATION MAKES THE STATUTE UNCONSTITUTIONAL AS VOID FOR VAGUENESS.

The Court of Appeals held that the words "conducted for profit" are "not clear and unambiguous" and that therefore the phrase "conducted for profit" in the wagering tax statute had a reach "at least as wide" as the word "profit" in "public performance for profit" in the Copyright Act. (Appendix C, infra, p. 50). This Court in Herbert v. Shanley, 242 U.S. 591 (1917) at p. 594, interpreted the words "public performance for profit" to exclude only a performance with eleemosynary purpose. A wagering tax enacted to reach a multi-billion dollar nation-wide gambling business (House Report, 1951-2 Cum. Bull. 397, and identical language in Senate Report, 1951-2 Cum. Bull. 539) (Appendix I, infra) with its concomitant occupational tax on the gambler conducting the business and the criminal penalty for failure to pay the occupational tax must be intelligible to those who are expected to obey the law. In White v.

Aronson, 302 U.S. 16 (1937), an excise tax case, this Court said at 20-21 that

> "Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them."

A wagering pool, 90 per cent of the gross receipts of which are distributed to the participants and the other 10 per cent distributed on their behalf to the Damon Runyon Memorial Fund for Cancer Research as a charitable contribution, is beyond the reach of the wagering tax statute. A Court of Appeals interpretation that defines a wagering pool conducted for profit to include petitioners' pools makes the wagering tax statute unintelligible and void for vagueness.

The responsibility for the financial aspects of the pool was that of the firm of independent certified public accountants. (II-R 34, certified transcript of the record from the United States Court of Appeals which is in two parts, I-R and II-R.) If the independent certified public accountants used their own staff to physically accept the wagers placed in the pool the employees would be within the job classification of persons liable for the $50 occupational tax under Section 3290 of the 1939 Code (Section 4411 of the 1954 Code) imposed on a person "who is engaged in receiving wagers for or on behalf of any person" liable for the wagering tax, and for the criminal penalty for failure to pay the tax before accepting the wagers. When, as in the instant case, a large-scale wagering pool is conducted, especially when a recognized public charity which is lending its name is the beneficiary, it is customary for the wagers to be accepted and recorded by independent certified public accountants. The reason is obvious. The interpretation of the wagering tax statute by the Court of Appeals subjects the independent certified public accountants to prosecution for a criminal

penalty.

The holding by the Court of Appeals that the words "conducted for profit" in the wagering tax statute have a reach "at least as wide" as the words "performance for profit" in the Copyright Act makes the statute unconstitutional as void for vagueness. As this Court said in United States v. Harriss, 347 U.S. 612 (1954), 617:

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

A person of ordinary intelligence cannot be expected to have fair notice that he is criminally responsible for failing to pay the $50 occupational tax before he accepts wagers placed in a wagering pool from which he cannot expect any financial benefit because all the contributions to the pool are distributed among the winners and on their behalf to a recognized public charity.

IV. THE COURT OF APPEALS INTERPRETATION MAKES THE STATUTE ARBITRARY AND IRRATIONAL AND THEREFORE UNCONSTITUTIONAL.

Section 3285(b) (1) of the 1939 Code (Section 4421 (1) of the 1954 Code) defines a wager as

> "(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit***."

The sole rational interpretation of the term "conducted for profit" in subparagraph (B) is profit derived from the operation of the pool. The wagering tax statute is instinct with an intent to tax a professional gambler on the profits derived from his gambling business, which before 1951 had enjoyed a relative immunity from State and Federal taxation. (Committee Reports, Appendix I, infra.) This is clearer in the arrangement of the entire wagering tax statute in Chapter 27A of the Internal Revenue Code of 1939, which is involved for the first two years in issue, 1953-1954, than it is in the 1954 Code, which separated the relevant sections, but was otherwise practically a verbatim reenactment.

Chapter 27A provided in Section 3285(a) for the 10 per cent tax on wagers; Section 3285(b) (1) (B) defined wagers to include a wager placed in a wagering pool conducted for profit; Section 3290 imposed an occupational tax of $50 per year on the person conducting the pool; Section 3291 required each person liable for the occupational tax to register with the collector of his district, and under regulations prescribed by the Secretary, the collector might require supplemental information as needful; Section 3293 required each person liable for the occupational tax either to keep conspicuously posted or on his person the stamp denoting payment of the tax; and Section 3294 provided a criminal penalty of not less than $1,000 and not more than $5,000 on the person liable for the occupational tax if he conducted the wagering pool without first paying the tax. (Appendix F, infra.)

Congress included the occupational tax and the criminal penalty to ensure that the business of a professional gambler is taxed. A wagering pool, 90 per cent of the gross receipts of which is distributed to the participants and the other 10 per cent of which is distributed on their behalf as a charitable contribution to the Damon Runyon Memorial Fund for Cancer Research, is so clearly outside the scope of a wagering tax statute that

the interpretation by the Court of Appeals makes the statute arbitrary and irrational, and therefore unconstitutional.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

JACK A. DONNELLEY

Attorney for Petitioners

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

D. I. OPERATING CO., a Nevada corporation, Plaintiff and UNITED RESORT HOTELS, INC., a Delaware corporation, as successor to UNITED HOTELS CORPORATION, a dissolved Delaware corporation, as successor to WILBUR CLARK'S DESERT INN CO., a dissolved Nevada corporation, Plaintiff and DESERT INN OPERATING COMPANY, a Nevada corporation, Plaintiff vs. UNITED STATES OF AMERICA, Defendant	Civil Nos. 313, 314, 315 CONSOLIDATED

OPINION

This is an action by a taxpayer to recover excise taxes; plus interest, paid under protest. These three cases were consolidated and tried to the Court. The three corporate plaintiffs, herein called the "Desert Inn", seek to recover One Hundred Sixty-three Thousand Three Hundred Ten and 87/100 Dollars (163,310.87), plus interest, in wagering taxes paid under protest for the period April, 1953 through April, 1959.

The following facts are not in dispute: Beginning in 1953, and continuing to date, the Desert Inn has sponsored, with the approval of the Professional Golfers Association, an annual Tournament of Champions in Las Vegas. Each year, during the period in question, 1953-1959, a calcutta pool was conducted by the Desert Inn. On the evening prior to the beginning of the golf tournament, the name of each participating professional golfer was offered for bid by an auctioneer to a private group of persons invited to attend a dinner and the auction in the Painted Desert Room of the Desert Inn Hotel. Ninety per cent of all sums received from successful bidders were paid into the pool and distributed after the tournament to the winners of the pool. The remaining ten per cent was contributed to the Damon Runyon Memorial Fund for cancer research. The Desert Inn retained no percentage of the sums received and made no charge for operating the pool.

The total gross receipts paid into the calcutta pool by successful bidders were as follows:

"1953	$ 93,250
1954	137,850
1955	202,500

1956	129,000
1957	265,650
1958	266,000
1959	380,000"

The Desert Inn had guaranteed the Runyon Cancer Fund a minimum of $35,000 annually. In each year, except 1959, ten per cent of the pool was less than $35,000, and the Desert Inn, in each of those years, made up the difference out of pocket.

In all of the years involved, both the calcutta pool and the Tournament of Champions were operated at a loss and these losses were claimed and allowed as expenses by the Desert Inn on its income tax returns.

26 U.S.C. Section 4401 (Internal Revenue Code of 1954) imposes an excise tax of ten per cent on wagers.

26 U.S.C. Section 4421 (1) (B) defines a wager as follows:

> "The term 'wager' means ... any wager placed in a wagering pool with respect to a sports event or a contest if such pool is conducted for profit." (Underscoring added)

The years 1953 and 1954 are governed by the Internal Revenue Code of 1939, and the years from and after 1955 are governed by the 1954 Code. See 26 U.S.C. Section 7851 (a) (4) of the 1954 Code.

In the Internal Revenue Code of 1939, Section 3285 (26 U.S.C. 1952 ed.) also imposed a ten per cent excise tax on wagers and defines the term "wager" in words

identical with Section 4421 of the 1954 Code:

> "The term 'wager' means . . . any wager placed in a wagering pool with respect to a sports event or contest, if such pool is conducted for profit." (Underscoring added)

Under Section 4421 of the 1954 Code, the Treasury promulgated Regulation Section 44.4421-1 (26 CFR 44.4421-1).

Section 44.4421-1 (a) (2) reads as follows:

> "(a) Wager. The term 'wager' means --
>
> (2) Any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit."

Section 44.4421-1 (c) (4) reads:

> "(4) Conducted for profit. A wagering pool or lottery may be conducted for profit even though a direct profit will not inure from the operation thereof. A wagering pool or lottery operated with the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits is conducted for profit for purposes of the wagering tax."

For the years 1953 and 1954, there was no similar Treasury regulation, but the Government urges that for those years, the language of Regulation 44.4421-1 (c) (4) constitutes a correct interpretation of the words "conducted for profit" as found in the statutes.

It has been stipulated that the calcutta pool constituted a wagering pool and the amounts paid into the pool

by the successful bidders constituted wagers within the meaning of the pertinent sections of the Internal Revenue Codes of 1939 and 1954. The only issue is whether or not the tax applies and this turns on the question of whether or not the calcutta pool was conducted for profit.

The Government contends that the tax of ten per cent upon the gross amount paid into the pool by the successful bidders was lawfully collected, arguing that the Desert Inn profited both directly and indirectly from the calcutta pool.

The Desert Inn's position is that there was no direct profit since the pool always operated at a loss, but the Desert Inn concedes that in conducting the pool, it expected to benefit indirectly by increased public patronage of its hotel, restaurants, bars and casino.

The evidence establishes not only that there was no direct profit, but that there was a loss in each year of the pool's operation.

The Government's arguments that the Desert Inn received direct financial benefits are so untenable as to be unworthy of comment, save one. The Government argues that there was a direct financial benefit from the operation of the pool because the ten per cent of the gross receipts and other expenses of the operation of the pool were entered in the corporate books as business and promotional expenses and claimed as deductions for income tax purposes. This is tantamount to an admission that the pool was operated at a loss. In any event, to the extent that such a loss is a benefit income tax wise, it could only be an indirect and not a direct benefit or profit to the Desert Inn.

The Court finds, therefore that the Desert Inn did not realize any direct benefit or profit from the pool, but actually sustained financial losses in the years

1953-1959.

On the other hand, the Court finds that although the pool was operated at a loss during the period in question, the Desert Inn did operate the pool with the expectancy of profit in the form of increased public patronage within the meaning of Regulation Section 44.4421-1 (c) (4).

There is only one, but most important, question to be resolved, and that is, whether or not Regulation Section 44.4421-1 (c) (4) is valid. If valid, the Government is entitled to judgment. If invalid, the Desert Inn must prevail.

This question is one of first impression.

A wager placed in a wagering pool is taxable if the pool was conducted for profit. What was the intent of Congress? Was it intended to tax wagering pools:

(a) only when the operator retained for his own benefit some portion or percentage of the gross amount wagered? or

(b) only when the operator collected a fee from the bettor? or

(c) In some other manner, realized a direct profit from the operation of the pool?

On the other hand, is a wagering pool conducted for profit when it is a trade stimulator, where its purpose is to promote other business activities of the operator, although one hundred per cent of the sums wagered are paid out?

Obviously, the Desert Inn would not have conducted the calcutta pool had it not anticipated some indirect financial benefit. The evidence reflects that the Desert

Inn management willingly took a loss on the pool, as well as on the Tournament of Champions of which it was a part, with the expectation that its other business activities, such as its hotel, restaurants, bars and casino would benefit. The pool was not operated for charity.

In 1951, Congress added to the Internal Revenue Code of 1939 Section 3285.[1]

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1 "Internal Revenue Code of 1939:

"SEC. 3285 (as added by Sec. 471 (a), Revenue Act of 1951, c. 521, 65 Stat. 4521). TAX.

(a) Wagers.--There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) Definitions.--For the purposes of this chapter--

(1) The term 'wager' means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term 'lottery' includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) Amount of Wager.--In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) Persons Liable for Tax.--Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

(26 U.S.C. 1952 ed., Sec. 3285.)"

The same wagering tax was carried forward in the Revenue Act of 1954.[2]

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[2] "Internal Revenue Code of 1954:

Sec. 4401. IMPOSITION OF TAX.

(a) Wagers.-- There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of Wager.--In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons Liable for Tax.--Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person, who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. (26 U.S.C. 1958 ed., Sec. 4401.)

"SEC. 4421. DEFINITIONS.

For purposes of this chapter--

(1) Wager.--The term 'wager' means--

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers.

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) Lottery.--The term 'lottery' includes the numbers game, policy, and similar types of wagering. The term does not include--

(A) any game of a type in which usually

The Court takes judicial notice that Congress passed the Wagering Tax Act not only to raise revenue, but also to aid law enforcement in attempting to surpress [sic] wide-spread, nation-wide, illegal gambling activities being carried on in violation of the criminal laws of the several States.

Senate Report No. 781, 82nd Congress, First Session 1951-1952, as quoted from in Plaintiffs' Opening Brief, is significant:

> "'The tax is limited (1) to wagers on sports events or contests placed with a person engaged in the business of accepting such wagers, (2) to wagers placed in a wagering pool which involves a sports event or contest, if the pool is conducted for profit, and (3) to wagers placed in a lottery conducted for profit. It is believed that wagering transactions of these types make up by far the largest proportion of the total gambling business.'"
>
> "' ... The requirement that the pool be operated for profit is designed to eliminate from the tax base those pools which are occasionally organized among friends or other associates, all of the contributions being distributed to the winner or winners.'"

(i) the wagers are placed,
(ii) the winners are determined, and
(iii) the distribution of prizes or other property is made,

in the presence of all persons placing wagers in such game, and

(B) any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(26 U.S.C. 1958 ed., Sec. 4421.)"

It was the intent of Congress to attempt to solve a national social problem, as well as to raise revenue. It was against profits earned from the business of conducting sport books, lotteries, numbers and policy games, as well as wagering pools that Congress took aim.

A careful reading of the Wagering Tax Act leads this Court to the conclusion that Congress never intended to tax wagering pools conducted at a loss as trade stimulators. There is no statutory authority subjecting the Desert Inn's calcutta pools conducted from 1953-1959 to the Wagering Tax Act. To do so, one would have to read into the law something that is not there. As the Supreme Court said in United States vs. Calamaro, 354 U.S. 351, at Pages 358 and 359:

> "In light of the above discussion, we cannot but regard this Treasury Regulation as no more than an attempted addition to the statute of something which is not there, (underscoring added). As such the Regulation can furnish no sustenance to the Statute."

The Court finds no ambiguity in the statutory language "conducted for profit". There being no ambiguity, there is nothing to construe.

In Fisher Flouring Mills Co. vs. United States, 9 Cir. 1959, 270 F.2d 27, at Page 30, we find the following language:

> "...it seems clear that the Supreme Court has not abandoned the axiom that the legislative will must be ascertained from the text of the statute if the words are clear and plain and the whole enactment internally cohesive . . . In virtue of legislative selectivity of objects of taxation, an act levying imposts should not be construed if unambiguous even by the use of adventitious aids

ordinarily available."

To hold the Regulation (44.4421-1 (c) (4)) valid would require this Court to read the words of the statute in a strained and unnatural sense.

> "'The popular or received import of words furnishes the general rule for the interpretation of public laws.'" Woolford Realty Co. v. Rose, 286 U.S. 319, 327.

The Court finds the case of Deshler Hotel Co. v. Busey, 36 F. Supp. 392, very persuasive. At Page 396, the Court stated:

> "The third requirement of the statute is that such public performances must have been for 'profit'. The same word is used in the regulation without any attempt to define it. The court is both entitled and required to give it the usual and accepted meaning. Since it has been found that no admission charge in any form was made it follows as a matter of logic, that the performances could not have been given for a direct profit. Rather it would appear that the entertainment was furnished at the expense of the hotel as an ordinary accompaniment of the service of food and refreshment in the manner customary to hotels of the class to which the plaintiff belongs; something expected by the customer and essential to good and profitable business relations, but in itself yielding no profit. In this case, the expense of the entertainment was an overhead expense incidental to the class of business in which the plaintiff was engaged. This court is therefore of the opinion and holds as a finding of fact, that such performances were not for

> profit in any accepted sense of the word, but that the expense involved was borne by the plaintiff as overhead. In general, it may be said that no commercial firm undertakes expenditures in the form of overhead without expecting a profit from the business in which the expenditures are made, but it is not from these overhead items that profit is derived. ' The profit is derived from the business itself and it is partially consumed by the overhead expenses; hence, such items are, in themselves, items of expense and not of profit."

On appeal, Busey v. Deshler Hotel Co., 130 F.2d 187, the Sixth Circuit, in affirming, said, in part, at Page 190:

> "To become binding, interpretative regulations must be reasonable and in furtherance of the intention of Congress, as evidenced by its Acts. An arbitrary regulation of the Commissioner of Internal Revenue is not enforceable. Where the language of a taxing statute is plain and unambiguous, there is no occasion for resort to interpretative promulgations of the Treasury Department. Neither the administrative officers nor the courts may supply omissions or enlarge the scope of the statute. See Iselin v. United States, 270 U.S. 245, 250, 251, 46 S.Ct. 248, 70 L.Ed. 566."

The Court is not unmindful of the rule set forth in Commissioner v. South Texas Co., 333 U.S. 496, at Page 501:

> "This Court has many times declared that Treasury regulations must be sustained unless unreasonable and plainly inconsistent

with the revenue statutes and that they constitute contemporaneous constructions by those charged with administration of these statutes which should not be overruled except for weighty reasons. See, e.g., Fawcus Machine Co. v. United States, 282 U.S. 375, 378."

The Regulation (44.4421-1 (c) (4)) is unreasonable and plainly inconsistent with the controlling statute.

The Government, at Pages 10 and 11 of its Brief, states, in part:

> " ' In speaking of the provisions which are in issue here, the relevant committee Reports stated (H. Rep. No. 586, 82d Cong., 1st Sess., p. 56 (1951-2 Cum. Bull. 357, 398); S. Rep. No. 781, 82d Cong., 1st Sess., p. 114 (1951-2 Cum. Bull. 458, 540)):
>
> > 'The requirement that the pool be operated for profit is designed to eliminate from the tax base those pools which are occasionally organized among friends or other associates, all the contributions being distributed to the winner or winners. A pool would be considered as being operated for profit, if, for example, a person appropriated to himself a percentage of the amount contributed to the pool or required a fee for the privilege of contributing to the pool.'
>
> " ' While the example given is of a pool where the operator retains a share, the import of the entire quotation is that only the social or friendly type of pool, occasionally organized among friends or associates, is to be excluded from the tax.' "

The Court judicially notices that it is customary, today, in many taverns and beer parlors, to conduct wagering pools of televised sporting events. All of the sums wagered are paid to the winner or winners. The house does not charge the bettor or participate in any way in the winnings. This practice increases the interest of patrons in such sporting events, stimulating trade. If the Regulation (44.4421-1 (c) (4)) is valid, the Government would tax the gross sums wagered in such cases because of the expectancy of indirect benefits or profits from increased public patronage. This is not done.

The Findings of Fact, Conclusions of Law and Judgment shall be prepared and submitted to the Court in accordance with local Rule 15.

DATED: January 4th, 1965.

Roger D. Foley
ROGER D. FOLEY
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

D. I. OPERATING CO., A Nevada corporation, Plaintiff	
and	Civil Nos. 313, 314, 315
UNITED RESORT HOTELS, INC., a Delaware corporation, as successor to UNITED HOTELS CORPORATION, a dissolved Delaware corporation, as successor to WILBUR CLARK'S DESERT INN CO., a dissolved Nevada corporation, Plaintiff	CONSOLIDATED FINDINGS OF FACT and CONCLUSIONS OF LAW
and	
DESERT INN OPERATING COMPANY, a Nevada corporation, Plaintiff	
v.	
UNITED STATES OF AMERICA, Defendant	

The above entitled causes having been consolidated for trial came on regularly for trial before this Court, sitting without a jury, commencing and concluding on

Wednesday, February 5, 1964.

The plaintiffs were represented by J. A. Donnelley, Esq. and the firm of Goldwater and Singleton.

The defendant was represented by John W. Bonner, Esq., United States Attorney, with Robert S. Linnell, Esq., Assistant United States Attorney appearing, and Messrs. Jerome Fink and Burton Schwalb, Department of Justice, Washington, D.C. appearing.

The Court having heard testimony of witnesses and having examined fully the exhibits and proof offered by the parties and having considered the written arguments of counsel and having on January 4, 1965 made and entered herein its written decision, now finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

I.

That this Court has jurisdiction of the above entitled actions by virtue of section 1346(a) (1) of Title 28 of the United States Code.

II.

That plaintiff United Resort Hotels, Inc. is a corporation organized and existing under and by virtue of the laws of the State of Delaware, having its principal office and place of business in Clark County, Nevada; that this corporation is the successor by merger of United Hotels Corporation, a dissolved Delaware Corporation which was the successor to Wilbur Clark's Desert Inn Co., a dissolved Nevada Corporation, which latter corporation managed and operated the hotel in Clark County, Nevada, known as Wilbur Clark's Desert Inn in April

of 1953.

III.

That plaintiff Desert Inn Operating Company is a corporation organized and existing under and by virtue of the laws of the State of Nevada, having its principal office and place of business in Clark County, Nevada and is the corporation that managed and operated said hotel in April of 1954 and in April of 1955.

IV.

That plaintiff D. I. Operating Co., is a corporation, organized and existing under and by virtue of the laws of the State of Nevada, having its principal office and place of business in Clark County, Nevada and is the corporation that managed and operated said hotel in April of 1956, April 1957, April 1958, and in April of 1959.

V.

That these actions are to recover excise taxes plus interest paid by each plaintiff under protest as more specifically set forth hereafter.

VI.

That prior to filing these actions plaintiffs complied with all required administrative procedures and filed all the required documents and forms with the Internal Revenue Service.

VII.

That except for the years and different amounts involved for each year the facts are identical in each action; hereafter when the word "plaintiff" is used, this

will refer to all plaintiffs and each action, and "Desert Inn" will refer to all plaintiffs and the hotel known as Wilbur Clark's Desert Inn in Clark County, Nevada.

VIII.

That beginning in April of 1953, and continuing to date, Desert Inn has sponsored, with the approval of the Professional Golfer's Association, an annual Tournament of Champions in Las Vegas. Each year during the period in question, 1953-1959, on the evening immediately preceding the commencement of the gold tournament a calcutta pool was conducted by Desert Inn. The name of each participating professional golfer was offered for bid by an auctioneer to a private group of persons invited to attend a dinner and the auction at the Desert Inn. Ninety per cent of all sums received from successful bidders were paid into the pool and distributed after the tournament to the winners of the pool. The remaining ten per cent was contributed by the bidders to the Damon Runyon Memorial Fund for Cancer Research. The Desert Inn retained no percentage of the sums received and made no charge for operating the pool. The Desert Inn had guaranteed the Runyon Cancer Fund a minimum of $35,000 annually. In each year, except 1959, ten per cent of the pool was less than $35,000 and Desert Inn in each of those years made up the difference out of pocket. In all of the years involved, both the calcutta pool and the Tournament of Champions were operated at a loss and these losses were claimed and allowed as expenses by Desert Inn on its income tax returns.

IX.

That 26 U.S.C. Section 4401 (Internal Revenue Code of 1954) imposes an excise tax of ten per cent on wagers.

26 U.S.C. Section 4421 (1) (B) (Internal Revenue Code of 1954) defines a wager as follows:

> "The term 'wager' means . . . any wager placed in a wagering pool with respect to a sports event or a contest if such pool is conducted for profit."

X.

That the years 1953 and 1954 are governed by the Internal Revenue Code of 1939, and the years from and after 1955 are governed by the 1954 Code.

XI.

That the Internal Revenue Code of 1939, Section 3285 (26 U.S.C. 1952) also imposed a ten per cent excise tax on wagers and defines the term "wager" in words identical with Section 4421 of the 1954 Code:

> "The term 'wager' means . . . any wager placed in a wagering pool with respect to a sports event or contest, if such pool is conducted for profit."

XII.

That the calcutta pools constituted a wagering pool and the amounts paid into the pools by the successful bidders constituted wagers within the meaning of the pertinent sections of the Internal Revenue Codes of 1939 and of 1954.

XIII.

That Desert Inn did not realize any direct financial benefit or profit from the calcutta pools, but actually sustained financial losses in the years 1953-1959.

XIV.

That under Section 4421 of the 1954 Code, the Treasury Department promulgated Regulation Section 44.4421-1 (26 CFR 44.4421-1).

Section 44.4421-1(a) (2) reads as follows:

> "(a) Wager. The term 'wager' means --
>
> "(2) Any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit."

Section 44.4421-1(c) (4) reads:

> "(4) Conducted for profit. A wagering pool or lottery may be conducted for profit even though a direct profit will not inure from the operation thereof. A wagering pool or lottery operated with the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits is conducted for profit for purposes of the wagering tax."

That for the years 1953 and 1954, there was no similar Treasury regulation.

XV.

That although the calcutta pools were operated at a loss during the period in question, Desert Inn did operate the pools with the expectancy of profit in the form of increased public patronage within the meaning of Regulation Section 44.4421-1(c) (4).

XVI.

That plaintiff United Resort Hotels, Inc. on August 1, 1957; paid to the office of the District Director of Internal Revenue in Nevada a tax of $11,059.32, plus interest in the sum of $597.73, or a total sum of $11,657.05, which said amount was paid under protest in connection with the assessment of the excise tax for the calcutta pool of April, 1953.

XVII.

That plaintiff Desert Inn Operating Company on August 1, 1957 paid to the office of the District Director of Internal Revenue in Nevada a tax of $14,694.62, plus interest in the sum of $883.62, or a total of $15,578.24, which said amount was paid under protest in connection with the assessment of the excise tax for the calcutta pool of April 1954; and on said date of August 1, 1957 paid to the office of the District Director of Internal Revenue in Nevada a tax of $22,801.22, plus interest in the sum of $1,298.03, or a total sum of $24,099.25, which said amount was paid under protest in connection with the assessment of the excise tax for the calcutta pool of April, 1955.

XVIII.

That plaintiff D. I. Operating Co. on August 1, 1957 paid to the office of the District Director of Internal Revenue in Nevada a tax of $19,314.94, plus interest in the sum of $1,230.72, or a total sum of $20,545.66, which said amount was paid under protest in connection with the assessment of the excise tax for the calcutta pool of April 1956; and on said date of August 1, 1957 paid to the office of the District Director of Internal Revenue in Nevada a tax of $26,565.00, plus interest in the sum of $265.65, or a total sum of $26,830.65 which said amount was paid under protest in connection with the assessment of the excise tax for the calcutta pool of April, 1957; and

on the date of June 20, 1958 paid to the office of the District Director of Internal Revenue in Nevada a tax of $26,600.00, which said amount was paid under protest in connection with the assessment of the excise tax for the calcutta pool of April, 1958; and on the date of April 29, 1959 paid to the office of the District Director of Internal Revenue in Nevada a tax of $38,000.00, which said amount was paid under protest in connection with the assessment of the excise tax for the calcutta pool of April, 1959.

XIX.

That said plaintiffs are entitled to interest as may be provided by law on the amounts so paid from the respective dates of payment.

CONCLUSIONS OF LAW

I.

That whereas any of the foregoing findings of fact be or may be held to be conclusions of law, they are by reference incorporated herein as if set forth verbatim.

II.

That there is no ambiguity in the statutory language "conducted for profit" set forth in 26 U.S.C. Section 4421(1) (B) (Internal Revenue Code of 1954) and in 26 U.S.C. Section 3285 (Internal Revenue Code of 1939).

III.

That Treasury Regulation 44.4421-1(c) (4) is not reasonable and not consistent with the controlling statute and is invalid.

IV.

That Plaintiff United Resort Hotels, Inc. have judgment against defendant in the sum of $11,657.05, plus interest as may be provided by law from August 1, 1957.

V.

That plaintiff Desert Inn Operating Company have judgment against defendant in the respective sums of $15,578.24 and $24,099.25, plus interest as may be provided by law from August 1,1957.

VI.

That plaintiff D. I. Operating Co. have judgment against defendant in the respective sums of $20,545.66, and $26,830.65, plus interest as may be provided by law from August 1, 1957; and judgment against defendant in the sum of $26,600.00, plus interest as may be provided by law from June 20, 1958; and judgment against defendant in the sum of $38,000.00, plus interest as may be provided by law from April 29, 1959.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED THIS 24th DAY OF MARCH, 1965

Roger D. Foley
UNITED STATES DISTRICT JUDGE

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APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

United States of America, Appellant, vs. D. I. Operating Co., Appellee.	No. 20,293
United States of America, Appellant, vs. United Resort Hotels, Inc. Appellee.	No. 20, 294
United States of America, Appellant, vs. Desert Inn Operating Company, Appellee.	No. 20, 295

[June 9, 1966]

On Appeal from the United States District Court for the District of Nevada

Before: MADDEN, Judge of the Court of Claims, and HAMLEY, and MERRILL, Circuit Judges.

MADDEN, Judge:

Section 4401 of the Internal Revenue Code of 1954 imposes an excise tax of ten per cent on wagers. Section 4421(1) (B) of the code defines a wager as:

> (1) Wager. - The term "wager" means - ***
>
> (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit.

Under section 4421 the Treasury has promulgated Treasury Regulation section 44:4421(1) (c) (4) construing the statutory language "conducted for profit":

> (4) Conducted for profit. A wagering pool or lottery may be conducted for profit even though a direct profit will not inure from the operation thereof. A wagering pool or lottery operated with the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits is conducted for profit for purposes of the wagering tax.

The question presented here is whether this Treasury Regulation is valid insofar as it interprets the word "profit" in section 4421(1) (B) of the code to include indirect as well as direct profit. The district court found that section 4421(1) (B) clearly and unambiguously referred only to direct profits of a wagering pool and held the Treasury Regulation to be invalid.[1] We reverse.

This case arises from the following undisputed facts as reported in the opinion of the district court. The three corporate defendants (herein referred to as the "Desert Inn" or the "Inn") seek to recover wagering taxes paid under protest for the period April, 1953

[1] D.I. Operating Co. v. United States, 239 F. Supp. 78 (D.C. Nev. 1965).

through April, 1959.[2] Beginning in 1953, and continuing through the years in question, the Desert Inn sponsored an annual golf "Tournament of Champions" in Las Vegas Nevada. Each year during the period in question a "calcutta" wagering pool was conducted by the Inn in conjunction with the tournament. On the evening prior to the beginning of the tournament the name of each participating professional golfer was offered for bid by an auctioneer to a private group of persons invited to dinner and the auction by the Desert Inn. Ninety per cent of the sums received from bidders went into the wagering pool and was distributed after the tournament to winners of the pool. The remaining ten per cent was contributed to the Damon Runyon Memorial Cancer Fund for cancer research.

The Desert Inn guaranteed the Cancer Fund a minimum of $35,000 in exchange for the right to use the Fund's name in connection with the tournament and the wagering pool.[3] In each year except 1959 ten per cent of the pool fell short of the $35,000, and the Desert Inn made up the shortfall out of pocket. In all the years involved both the pool and the golf tournament were operated at a loss, and these losses were claimed and

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[2] The years 1953 and 1954 are governed in this case by the Internal Revenue Code of 1939 and the later years in question are governed by the 1954 code. See §7851(a) (4) of the 1954 code. Section 3285 of the 1939 code, added by ch. 521, §471 (a), 65 Stat. 352 (1951), also imposed the ten per cent excise tax on wagers and defined "wager" in words identical to the language of §4421 (1) (B) of the 1954 code. No treasury regulation corresponding to §44.4421-1(c) (4) was promulgated under the 1939 code. If that regulation, however, correctly construes the term "conducted for profit" in §4421(1) (B) of the 1954 code, it would also be a proper construction of the identical language in the 1939 code.

[3] The district court made no finding whether the $35,000 payment was made to have the Fund sponsor the calcutta or the entire tournament, including the calcutta; but there is evidence in the record showing that the entire tournament was advertised as under the sponsorship of the Fund. We do not, however, consider resolution of this question relevant to our decision here.

allowed as business expenses of the Desert Inn for income tax purposes. The Inn made no charge for operating the pool.

The district court found that, although the wagering pool was operated at a loss during the period in question, the Desert Inn did conduct the pool with the expectation of indirect profit in the form of increases in public patronage within the meaning of the challenged regulation section 44.4421-1(c) (4). It is not in dispute that the management of the Inn willingly accepted losses on the pool as well as on the tournament itself in the expectation of increased profits from the Inn's hotel, restaurants, bars and gambling operations. As the district court said, "The pool was not operated for charity." D. I. Operating Co. v. United States, 239 F. Supp. 78, 81 (D.C. Nev. 1965).

It was stipulated that the calcutta pool constituted a wagering pool and that the amounts paid into the pool constituted wagers. The only question here, therefore, is whether the tax applies, and this turns on the validity of the regulation in question - whether a pool conducted for the kinds of indirect benefits contemplated by the Desert Inn is a pool "conducted for profit" within the meaning of the relevant sections of the 1939 and 1954 codes.[4]

Two separate lines of authority are urged upon us by the parties in support of their respective positions.

[4] The government also argues that the tax applies in this case because the Desert Inn received a direct financial benefit from the pool. The government takes the position that the Inn's retention of ten per cent of the calcutta fund in partial reimbursement for the $35,000 guarantee, which was paid by the Inn in advance to the Cancer Fund, was, in effect, retention of a portion of the pool to defray a business expense. However, only to the extent that the retained ten per cent fell short of $35,000 did the Inn incur a business expense with regard to the guarantee. The district court's finding that the Desert Inn realized no direct profit from the pool is correct.

Appellee and the district court found support for a narrow application of the phrase "conducted for profit" in cases construing the phrase "public performance for profit" in the pre-1942 version of the so-called cabaret tax statute. Prior to 1942 section 500(a) (5) of the Revenue Act of 1926, ch. 27, 44 Stat. 9, imposed a tax on amounts "paid for admission to any public performance for profit at any roof garden, cabaret or other similar entertainment, to which the charge for admission is wholly or in part included in the price paid for refreshment, service or merchandise."[5] Two district court opinions construing the section indicated, without specifically holding, that only where profit was directly realized from the performance in question did the statute apply.[6]

On the other hand, the government relies upon cases construing the identical words "performance for profit" in the Copyright Act, 17 U.S.C. §1(e) (1958), where the phrase has been broadly interpreted to include indirect profit. In the recent case of Chappell & Co. v. Middletown Farmers Market & Auction Co., 334 F.2d 303 (3rd Cir. 1964), the appellee, a shopping center, piped recorded, copyrighted music throughout the center during shopping hours. The court held that such was a "performance for profit" to the extent "that it was commercially beneficial," without regard to whether the pecuniary benefit was direct or indirect. Ibid at 306.

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[5]The cabaret tax was amended by the Revenue Act of 1942 to eliminate the requirement of an admission charge for imposition of the tax. As thus amended, the tax remains, substantially unchanged, as §§4231, 4232 of the 1954 code. See §4232(c).

[6]United States v. Broadmoor Hotel Co., 30 F.2d 440 (D.C.Colo.1929); Deshler Hotel Co. v. Busey, 36 F.Supp. 392 (S. D. Ohio 1941). The latter case was affirmed upon appeal on the single ground that there was no increased charge for food or service in connection with the performance involved. Broadmoor Hotel was cited with approval. Busey v. Deshler Hotel Co., 130 F.2d 187 (6th Cir. 1942).

We find neither the cabaret tax cases nor the copyright cases compelling here. The pre-1942 cabaret tax statute and the litigation involving it were concerned primarily with the requirement that the performance in question be attended by some admission fee or increased charges to patrons. As long as this requirement was in the statute, it was impossible for the tax to apply where there was no direct profit involved.

In the copyright cases, on the other hand, the courts have been concerned with protecting the monopoly rights created under the Copyright Act.[7] No similar concern for the protection of a specific statutory right guides the construction of the wagering tax law.

While neither of these lines of authority is controlling here, they do suggest, contrary to the holding of the district court, that the statute before us is not clear and unambiguous. There is nothing in the word "profit" as it appears in section 4421(1) (B) which indicates that the gain referred to must be derived from the wagering pool itself, and the potential reach of the phrase "conducted for profit" would appear at least as wide as that of "performance for profit." In such circumstances it is well settled that treasury regulations are to be accorded great weight and not overruled unless shown to be plainly inconsistent with the statute. Koshland v. Helvering, 298 U.S. 441, 446 (1936).

The regulation in question takes the position that a wagering pool conducted for a commercial purpose is a pool "conducted for profit." A study of the legislative history of the statute indicates that the specific question involved here was not adverted to when the wagering tax

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[7]The Supreme Court long ago concluded that "if the rights under copyright are infringed only by a performance where money is taken at the door, they are very imperfectly perfected [sic]." Victor Herbert, et al v. Shanley Co., et al., 242 U.S. 591, 593 (1917).

was added to the Internal Revenue Code by the Revenue Act of 1951. That history does indicate, however, that the position taken by the regulation is consistent with the broad purpose of the tax. The committee reports accompanying the statute reveal that it was intended to make "commercialized gambling" help meet "the present need for increased revenue, especially at a time when many consumer items of a semi-necessity nature are being called upon to bear new or additional tax burdens." H. Rep. No. 586, 82d Cong., 1st Sess., p. 55 (1951-2 Cum. Bull. 357, 397); S. Rep. No. 781, 82d Cong., 1st Sess., p. 113 (1951-2 Cum. Bull. 458, 539.) Whatever ancillary regulatory effect the wagering tax might have, it was intended as a revenue measure. U. S. v. Kahriger, 345 U.S. 22 (1953).

The phrase "conducted for profit" is not so clear and unambiguous as to be closed to construction, and the revenue purposes of the statute are best served by construing it broadly. The regulation in question is not inconsistent with the terms of the statute and is consistent with the congressional intent that commercialized gambling contribute an increased share to the national revenues. We find it to be a valid interpretation of §4421(1) (B).

There is no question that the regulation was properly applied in this case. The committee reports accompanying the statute state that the tax was not meant to apply to the purely "social" or "friendly" type of betting pool sometimes organized among friends or other associates. H. Rep. No. 586, supra at 55-56; S. Rep. No. 781, supra at 113-114. While the Desert Inn's calcutta was an invitation-only affair, it was hardly the kind of "social" or "friendly" pool whose exclusion from the tax was contemplated by Congress.

The decision of the district court is reversed.

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APPENDIX D-1

Judgment

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

United States of America	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 20, 293
	)	
D. I. Operating Co.,	)	
	)	
Appellee.	)	

APPEAL from the United States District Court for the District of Nevada

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

Filed and entered June 9, 1966

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APPENDIX D-2

Judgment

UNITED STATES COURT OF APPEALS
For The Ninth Circuit

UNITED STATES OF AMERICA	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 20, 294
	)	
UNITED RESORT HOTELS, INC.,	)	
	)	
Appellee.	)	

APPEAL from the United States District Court for the District of Nevada

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Reversed.

Filed and entered June 9, 1966

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APPENDIX D-3

Judgment

UNITED STATES COURT OF APPEALS
For The Ninth Circuit

UNITED STATES OF AMERICA	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 20,295
	)	
DESERT INN OPERATING COMPANY,	)	
	)	
Appellee.	)	

APPEAL from the United States District Court for the District of Nevada

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

Filed and entered June 9, 1966

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APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, August 5, 1966

Before: MADDEN, Judge of the Court of Claims, and
HAMLEY, and MERRILL, Circuit Judges

ORDER OF DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellees filed July 12, 1966, and within time allowed therefor by rule of court, and valid extension thereof, for a rehearing of above cause be, and hereby is denied, and suggestion for rehearing en banc is denied.

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APPENDIX F

CHAPTER 27A, INTERNAL REVENUE CODE OF 1939:

SUBCHAPTER A---TAX ON WAGERING.

SEC. 3285. (as added by Sec. 471(a), Revenue Act of 1951, c. 521,65 Stat. 531). TAX.

(a) WAGERS.--There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) DEFINITIONS.--For the purposes of this chapter--

(1) The term "wager means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) AMOUNT OF WAGER.--In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be

included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) PERSONS LIABLE FOR TAX.--Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

* * * * * * * * *

(26 U.S.C. 1952 ed., Sec. 3285).

SUBCHAPTER BB--OCCUPATIONAL TAX.

SEC. 3290. TAX.

A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.
(26 U.S.C. 1952 ed., Sec. 3290).

SEC. 3291. REGISTRATION.

(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district--

(1) his name and place of residence;

(a) if he is liable for tax under subchapter A,

each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.
(26 U.S.C. 1952 ed., Sec. 3291).

SEC. 3293. POSTING.

Every person liable for special tax under this subchapter shall place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person, and exhibit it, upon request, to any officer or employee of the Bureau of Internal Revenue.
(26 U.S.C. 1952 ed., Sec. 3293).

SEC. 3294 PENALTIES.

(a) FAILURE TO PAY TAX.--Any person who

does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

* * * * * * * * *.

(26 U.S.C. 1952 ed., Sec. 3294).

APPENDIX G

INTERNAL REVENUE CODE OF 1954:

CHAPTER 35-- TAXES ON WAGERING

SUBCHAPTER A--TAX ON WAGERS

SEC. 4401. IMPOSITION OF TAX.

(a) WAGERS.--There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) AMOUNT OF WAGER.--In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amoumt so collected shall be excluded.

(c) PERSONS LIABLE FOR TAX.--Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.
(26 U.S.C. 1958 ed., Sec. 4401).

SUBCHAPTER B--OCCUPATIONAL TAX

SEC. 4411. IMPOSITION OF TAX.

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.
(26 U.S.C. 1958 ed., Sec. 4411).

SEC. 4412. REGISTRATION.

(a) REQUIREMENT.--Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district--

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) FIRM OR COMPANY.--Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) SUPPLEMENTAL INFORMATION.--In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register

under this section as may be needful to the enforcement of this chapter.
(26 U.S.C. 1958 ed., Sec. 4412).

SUBCHAPTER C--MISCELLANEOUS PROVISIONS

SEC. 4421. DEFINITIONS.

For purposes of this chapter--

(1) WAGER.--The term "wager" means-

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) LOTTERY.--The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include--

(A) any game of a type in which usually

(i) the wagers are placed,

(ii) the winners are determined, and

(iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and

(B) any drawing conducted by an organization exempt from tax under sections 501 and 521,

if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.
(26 U.S.C. 1958 ed., Sec. 4421).

CHAPTER 69--GENERAL PROVISIONS RELATING TO STAMPS

* * * * * * * * *

SEC. 6806. POSTING OCCUPATIONAL TAX STAMPS.

* * * * * * * * *

(c) OCCUPATIONAL WAGERING TAX.--Every person liable for special tax under section 4411 shall place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person, and exhibit it, upon request, to any officer or employee of the Treasury Department.
(26 U.S.C. 1958 ed., Sec. 6806).

CHAPTER 75--CRIMES, OTHER OFFENSES, AND FORFEITURES

* * * * * * * * *

SEC. 7262. VIOLATION OF OCCUPATIONAL TAX LAWS RELATING TO WAGERING--FAILURE TO PAY SPECIAL TAX.

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.
(26 U.S.C. 1958 ed., Sec. 7262).

APPENDIX H

TREASURY REGULATIONS 132 (1939 CODE):

Sec. 325.21 Scope of tax. (a) Section 3285 imposes a tax on (1) all wagers placed with a person engaged in the business of accepting wagers upon the outcome of a sports event or a contest; (2) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit; and (3) any wager placed in a lottery conducted for profit.

* * * * * * * * *

(c) A wagering pool conducted for profit includes any scheme or method for the distribution of prizes to one or more winning bettors based upon the outcome of a sports event or a contest, or a combination or series of such events or contests, provided such wagering pool is managed and conducted for the purpose of making a profit.

* * * * * * * * *

TREASURY REGULATIONS ON WAGERING TAX (1954 Code):

Sec. 44.4421-1 Definitions.

(a) Wager. The term "wager" means--

(1) Any wager placed with a person engaged in the business of accepting wagers upon the outcome of a sports event or a contest;

(a) Any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit; and

(3) Any wager placed in a lottery conducted for profit.

* * * * * * * * * *

(c) Other terms used--

(1) Wagering pool. A wagering pool conducted for profit includes any scheme or method for the distribution of prizes to one or more winning bettors based upon the outcome of a sports event or a contest, or a combination or series of such events or contests, provided such wagering pool is managed and conducted for the purpose of making a profit.

* * * * * * * * * *

(4) Conducted for profit. A wagering pool or lottery may be conducted for profit even though a direct profit will not inure from the operation thereof. A wagering pool or lottery operated with the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits is conducted for profit for purposes of the wagering tax. (26 C.S.R. Sec. 44.4421-1).

APPENDIX I

HOUSE REPORT and SENATE REPORT state the following:

(1951-2 Cum. Bull. 396 at 397-398 (H.R.) and 538 at 539-540 (S. R.))

(The quotation below, being from the Senate Report, has a slight modification which, of course, was not in the House Report.)

"Commercialized gambling holds the unique position of being a multi-billion-dollar, Nation-wide business that has remained comparatively free from taxation by either State or Federal Governments. This relative immunity from taxation has persisted in spite of the fact that wagering has many characteristics which make it particularly suitable as a subject for taxation. Your committee is convinced that the continuance of this immunity is inconsistent with the present need for increased revenue, especially at a time when many consumer items of a seminecessity nature are being called upon to bear new or additional tax burdens.

* * * * * * * * * *

"1. Tax on wagers.

"The wagering tax which both your committee's bill and the House bill imposes is placed upon wagers, without regard to the outcome of individual bets. This method of taxation is comparable to State taxation of parimutuel pools and is particularly appropriate with respect to wagering with bookmakers and in lotteries, especially of the type commonly known as the numbers game. The tax is limited (1) to wagers on sports events or contests placed with a person engaged in the business of accepting such wagers, (2) to wagers placed in a wagering pool

which involves a sports event or contest, if the pool is conducted for profit, and (3) to wagers placed in a lottery conducted for profit. It is believed that wagering transactions of these types make up by far the largest proportion of the total gambling business.

"While betting on horse races probably represents the largest single category of gambling activity, other than in lotteries, the tax will extend to wagers on any other sport, such as prizefights, basketball, baseball, or football, including sports exhibitions and trials. Moreover, the event wagered upon need not be a sports activity but can be any type of contest, such as an election or the outcome of primaries and nominating conventions.

"Wagers on sports events or contests, to be taxable, must be placed with a person engaged in the business of accepting such wagers. The purpose of this requirement is to exclude from tax the purely 'social' or 'friendly' type of bet. A person is considered to be in the business of accepting wagers if he is engaged as a principal who, in accepting wagers, does so on his own account. The principals in such transactions are commonly referred to as 'bookmakers,' although it is not intended that any technical definition of 'bookmaker,' such as the maintenance of a handbook or other device for the recording of wagers, be required. It is intended that a wager be considered as 'placed' with a principal when it has been placed with another person acting for him. Persons who receive bets for principals are sometimes known as 'bookmakers' agents' or as 'runners.' It is not intended that to be 'engaged in the business of accepting such wagers' a person must be either so engaged to the exclusion of all other activities or even primarily so engaged. Thus, for example, an individual may be primarily engaged as a salesman, and also, for the purposes of this tax, be engaged in the business of accepting wagers.

"As previously stated, wagers placed in a wagering pool with respect to a sports event or a contest are

taxable if the pool is conducted for profit. The requirement that the pool be operated for profit is designed to eliminate from the tax base those pools which are occasionally organized among friends or other associates, all of the contributions being distributed to the winner or winners. A pool would be considered as being operated for profit, if, for example, a person appropriated to himself a percentage of the amount contributed to the pool or required a fee for the privilege of contributing to the pool."

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 736

D. I. OPERATING CO., UNITED RESORT HOTELS, INC., DESERT INN OPERATING COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented is whether a wagering pool conducted by petitioners was covered by the 10 percent wagering tax provisions of the Internal Revenue Codes of 1939 and 1954. Petitioners agree that the pool met all of the statutory qualifications except the requirement that it be "conducted for profit." 1954 Code § 4421(1)(B).[1] The Treasury Regulations under the 1954 Code define "conducted for profit" broadly, as including "the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits." Treas. Reg. on Wagering Tax (1954 Code),

[1] Section 3285 was added to the 1939 Code by the Revenue Act of 1951, c. 521, § 471(a), 65 Stat. 452.

§ 44.4421–1(c)(4).[2] The facts as found by both lower courts put petitioner within the scope of this Regulation. Thus the only question presented by this case is the validity of the Regulation. The decision below is correct, and there is no conflict or other reason for review.

Petitioners are three corporate entities which at various times during the years involved (1953 through 1959) owned and operated the Desert Inn, a resort hotel in Las Vegas, Nevada. During these years, the Inn annually conducted a professional golf tournament, known as the Tournament of Champions, as an adjunct to which it operated a "calcutta," or wagering pool, in which the participating golfers were "purchased" at an auction held in the hotel on the night preceding the tournament. The amounts paid into the pool ranged from $93,000 in 1953 to $380,000 in 1959. At the conclusion of the tournament each year 90 percent of the pool was distributed to the winning bidders. The remaining 10 percent was retained by the Inn to reimburse it for a guaranty paid in advance ($35,000 per year, or ten percent of the pool, whichever was greater) to the Damon Runyon Fund for Cancer Research, a tax exempt organization, whose name was used as sponsor of the tournament and the wagering pool. (Pet. 22–23, 46–47; I–R 47–48.)[3]

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[2] No corresponding treasury regulation was promulgated under the 1939 Code. However, as the court below observed, if the 1954 Code regulation correctly construed the term "conducted for profit" in § 4421(1)(B) of the 1954 Code, it would also be a proper construction of the identical language in the 1939 Code.

[3] "I–R" references are to volume I of the record on appeal.

Petitioners do not deny that the wagering pool was conducted for commercial reasons. The pool was expected to and did result in financial gain for the Inn in the form of increased revenue at its gambling casino, increased patronage of its other facilities, increased attendance at the tournament itself, to which an admission charge was made, and increased profit from the overall operation of the Inn beyond the tournament period, resulting from the publicity and advertising in connection with the pool. (I–R 26–27.)[4]

The sole issue is whether the pool was "conducted for profit," within the meaning of the Code, so as to subject petitioners to the excise tax on wagers. The court of appeals upheld the validity of the applicable Treasury Regulation which states that the term "profit" includes indirect pecuniary benefits.

1. The statutory phrase "conducted for profit" is clearly susceptible to the interpretation that it includes not only gain derived directly from the wagering pool itself but also indirect commercial gain from operation of the pool. In such circumstances, the promul-

[4] The government urged below, alternatively, that petitioners' retention of 10 percent of the pool as partial reimbursement for the $35,000 guarantee paid to the Damon Runyan Fund for the use of its name constituted a direct pecuniary benefit to the Inn. Petitioners had previously deducted the amount paid to the Runyan Fund, for income tax purposes, as a business expense rather than as a charitable contribution. Although both the district court and the court of appeals rejected the government's alternative argument, both agreed that the pool had not been operated for charitable purposes. Thus petitioners' statements in the petition that 10 percent of the pool was "distributed on their behalf as a charitable contribution" (Pet. 18, see also *id.* 16) are not warranted.

gation of regulations defining the statutory language was both appropriate and necessary. Since the construction adopted in the Regulation is consistent with the statutory provisions and the underlying legislative objectives, it is entitled to the controlling weight accorded it by the decision below. *Koshland* v. *Helvering*, 298 U.S. 441, 446.

There is no merit in petitioners' criticism of the lower court's reasoning. The court of appeals recognized that the word "profit" does not have a single fixed and invariable meaning but must obviously take its content from the relevant statutory context and underlying legislative history. It then examined these sources and found support for the Regulation defining "profit," for wagering tax purposes, as including any form of sought-for pecuniary advantages. Contrary to petitioners' averment (Pet. 6), the court of appeals did not lay undue stress upon cases defining the term "profit" in other areas of the law; the court's opinion states that it did not consider these other "lines of authority * * * [as] controlling here" but rather as suggesting, "contrary to the holding of the district court, that the statute before us is not clear and unambiguous" (Pet. 50). Nor did the court below misread the legislative history of the statute here involved, as implied in the petition. (Pet. 12–13). The portions of the Committee Reports specifically dealing with the subsection here in question (1939 Code § 3285(b)(1)(B)) express an intent to exclude from tax only wagering pools "occasionally organized among friends or other associates, all the contributions being distributed to the winner or winners." H. Rep. No.

586, 82d Cong., 1st Sess., p. 56 (1955–2 Cum. Bull. 357, 398); S. Rep. No. 781, 82d Cong., 1st Sess., p. 114 (1951–2 Cum. Bull. 458, 540). Moreover, the portion of the Committee Reports dealing with the adjoining subsection (1939 Code, § 3285(b)(1)(A)), which were also cited by the court, are obviously relevant, since the two subsections manifestly have a common purpose.[5]

Both lower courts emphasized that petitioner's venture was a commercial one, "not operated for charity," but rather in the expectation of increased profits from the Inn's hotel, restaurants, bars and gambling operations (Pet. 48). Thus the decision below was clearly correct.

2. Raising arguments made for the first time on the filing of their petition for rehearing in the court of appeals, petitioners contend (Pet. 17–19) that the Ninth Circuit's construction of the term "profit" renders the wagering tax statute unconstitutionally vague. In so doing they advert to the occupational tax requirement of § 4411 of the 1954 Code and the criminal sanction for non-compliance therewith. If

[5] Nor is there merit either in petitioners' objection (Pet. 14–15) to the characterization of the wagering pool as "commercialized gambling" or in their assertion that the decision below conflicts with *Malat* v. *Riddell*, 383 U.S. 569. The concession that the pool was a wagering pool and the fact, as both courts below found, that it "was not operated for charity" but rather with expectation of a profit, (Pet. 48) carry strong implications of commercialized gambling; and obviously this Court's determination in *Malat* that the term "primarily" as used in Section 1221(1) of the 1954 Code means "of first importance" or "principally," not "substantial," raises no direct conflict with the decision below.

petitioners mean that the possibility of criminal prosecution with respect to wagering activity calls for a restrictive construction of the term "profit," it may be parenthetically observed that even where a controversy involves criminal action it is not required that a "criminal statute * * * be given the narrowest possible meaning in complete disregard of the purpose of the legislature." *United States* v. *Bramblett,* 348 U.S. 503, 509–510. In any event, petitioners are not before this Court on any criminal charge[6]; the instant proceeding is an attempt to recover excise taxes paid. Wholly aside from the fact that no constitutional question was raised below, it would be premature and inappropriate to consider such a claim of alleged constitutionality in a civil proceeding unrelated to the application of any criminal sanction. Cf. *United States* v. *Delaware & Hudson Co.,* 213 U.S. 366, 417; *United States* v. *Harris,* 347 U.S. 612, 627.[7]

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[6] The pool ended in 1959. Petitioners have not been criminally prosecuted in connection with its operation, a fact which the record does not reveal because no constitutional issue was raised below.

[7] The Court has before it this term for argument two criminal cases under the wagering tax statutes (*Costello* v. *United States,* No. 41, and *Grosso* v. *United States,* No. 181). The constitutional argument in those cases based on the privilege against self-incrimination could not be made here, since the taxpayers are all corporations and no liability is asserted against their employees. Petitioners' suggestion that they might be criminally prosecuted ignores the fact that the six-year statute of limitations (26 U.S.C. 6531, 7851) has run for the years involved (1953–1959).

[7] This Court has frequently restated the principle that constitutional questions are not to be decided in hypothetical settings. *Barrows* v. *Jackson,* 346 U.S. 249, 256; *United States* v. *Raines,* 362 U.S. 17, 21; *Zemel* v. *Rusk,* 381 U.S. 1.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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